

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN C. TURNER and U.S. POSTAL SERVICE,
POST OFFICE, Babylon, NY

*Docket No. 98-1835; Submitted on the Record;
Issued August 17, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective February 2, 1997 for the reason that he no longer was disabled due to residuals of his employment injury of June 24, 1973.

On June 24, 1973 appellant, then a 30-year-old postal clerk, slipped on a letter at work and filed a claim for traumatic injuries to his back and knees. The Office accepted the claim for compression fracture of the left 4th vertebra and sprain of both knees. The claim was later expanded to include a subluxation at L-4.¹ Appellant received compensation benefits and was placed on the periodic rolls. He has not worked since June 24, 1973.

Appellant was initially under the care of Drs. Sanford A. Ratzan and Bert S. Horwitz, Board-certified orthopedists. An x-ray of the lumbar spine dated September 7, 1973 showed a small fracture of the anterior-superior margin of the body of L4 with overall satisfactory position and alignment. Appellant was prescribed medication, bed rest and a lumbosacral corset for his back condition. He has also undergone continuing chiropractic treatment with Dr. William J. Kowalski.

Appellant subsequently came under the care of Dr. Stephen Zolan. In a report dated March 26, 1984, Dr. Zolan opined that appellant's continuing back pain was caused by post-traumatic discogenic disease with radiculitis, which would probably grow worse. He concluded that appellant was disabled from work.

In a May 19, 1995 report, Dr. Zolan outlined appellant's course of treatment and the objective evidence in response to an inquiry by the Office as to the nature and extent of appellant's disability. He reported that appellant was unable to work and stated that his disability was related to the 1973 work injury. According to Dr. Zolan, appellant's condition

¹ An x-ray dated December 19, 1984 was interpreted as showing a subluxation.

progressed from a compression fracture to degenerative disc disease to posterior facet subluxation and chronic pain. He advised that appellant was to avoid long periods of standing or sitting and extremes of temperature. Dr. Zolan further noted that, since appellant was under medication for pain, he would present a hazard if returned to his regular job or other gainful employment.

Appellant accepted a job offer as a modified clerk and was to return to work on December 23, 1995; however, he advised the employing establishment on December 22, 1995 that his treating physician considered him to be disabled from work.

Appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine on July 3, 1996 which was read by a radiologist as showing mild desiccation L3-4 without protusional bulge or herniation, as well as disc narrowing and desiccation of L5-S1 with central subligamentous disc herniation.

In a July 8, 1996 report, Dr. Arnold J. Illman, a Board-certified orthopedist and Office referral physician, noted that on July 24, 1973 appellant sustained a compression fracture at L4 and sprain of both knees. He reported that appellant's knees were no longer problematic, but that appellant continued to complain of lower back pain with radiation down the left leg and pain down the right leg with numbness into the foot. Dr. Illman noted physical findings and reviewed the February 1996 MRI scans. He noted that the fracture appellant sustained in 1973 was only mild and should have healed without significant problems. Dr. Illman also noted that appellant's MRI scans did not support a diagnosis of radiculitis. He concluded that appellant was capable of returning to work on an eight-hour basis, no restrictions and that he had no further need for physical therapy or orthopedic care.

In a report dated September 5, 1996, Dr. Victor Chehebar, a Board-certified neurologist, noted that appellant was seen for treatment of radiculopathy. He was also to ascertain whether or not he had an L4-5, L5-S1 disc bulge versus a herniation. Dr. Chehebar indicated that appellant underwent a neurodiagnostic workup including a normal extremity SSEP on June 25, 1996, a normal electromyogram (EMG), a July 1, 1996 knematic analysis and a July 2, 1996 MRI scan of the lumbar spine showing a mild disc desiccation with a central subligamentous disc herniation at L5-S1. He reviewed Dr. Illman's July 8, 1996 report and noted his disagreement with Dr. Illman that appellant did not have a herniated disc. Dr. Chehebar stressed that he was better qualified as a neurologist to evaluate appellant's MRI scans and stressed that an MRI scan cannot invariably detect compression. He concluded that, given the nature of appellant's work, his symptoms of radiculopathy, his long-standing complaints of lower back pain, the MRI scans, appellant sustained a disc herniation at L5-S1 causally related to the June 24, 1973 back trauma. He further opined that appellant was totally disabled and unable to perform gainful employment.

The employing establishment submitted a memorandum of postal inspector dated October 10, 1996 documenting periodic surveillance made of appellant from June to September 1996, indicating that appellant was observed driving, shopping, climbing a ladder, painting a step ladder, emptying the garbage and carrying lumber.

In order to resolve a conflict in the medical evidence on the issue of continuing disability, the Office referred appellant along with a copy of the medical record and a statement of accepted facts to Dr. Anthony G. Puglisi, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a report dated December 20, 1996, Dr. Puglisi noted appellant's history of injury and symptoms of lower back pain for 23 years along with radiating pain on occasion to either or both legs. He reviewed the July 3, 1996 MRI scan and stated that it showed osteoarthritic changes of the lower back and "a disc herniation of some 3.0 mm described as a 'subligamentous disc herniation' without any neural element impingement, which was very revealing ... as it really indicated there was not very much here to explain [appellant's] persistence of discomfort over such a long period of time." Dr. Puglisi noted physical findings and diagnosed status post compression fracture L4 vertebral body with degenerative spondylolisthesis of the L4 vertebra on L5. He further opined that appellant presented with symptom magnification and stated: "many of the findings that are seen in the 1996 MRI [scan] ... are associated with age dependent spinal degeneration and truly difficult to correlate with [appellant's] current symptoms. Even the spondylolisthesis of the L4 vertebra on L5 is secondary to degenerative changes and was not present at the time of the [work incident] and therefore not caused by the incident itself ... it is particularly revealing to note that [he] had no real discomfort of his lower back until almost 48 hours later, when seeing Dr. Ratzan the following day he admits to feeling 'fine.' I think in my mind it would be close to impossible to imagine how someone could sustain a compression fracture of the vertebral body or any [inter-vertebral disc herniation from one singular incident of a fall] and had this amount of disability over such a long period of time." Dr. Puglisi concluded that at the time of appellant's work injury he sustained a back strain or minimal compression fracture at L4 that would have resolved with three months without any specific finding of a disc herniation. He also concluded that, based on appellant's degenerative back condition, appellant was capable of performing only sedentary work.

On August 28, 1996 the Office issued a notice of proposed termination of compensation and medical care advising appellant that the medical evidence of record no longer demonstrated that he had continuing disability or residuals causally related to his accepted work injury. Appellant was given 30 days to submit additional evidence.

In a decision dated January 16, 1997, the Office terminated appellant's compensation benefits effective February 2, 1997.

On January 6, 1998 appellant filed a motion for reconsideration and submitted additional medical evidence.

In conjunction with his reconsideration request, appellant submitted an October 30, 1997 report from Dr. Chehebar who opined that, as a result of his June 24, 1973 work injury, appellant sustained a lumbar disc herniation confirmed by the July 2, 1996 MRI scan. He further opined that appellant suffered from radiculopathy secondary to the herniation and was totally disabled from all work.

In a report dated November 6, 1997, Dr. Kowalski advised that appellant had been under his chiropractic care since December 1984 due to chronic hip, right leg and knee pain. He noted

range of motion findings and positive orthopedic tests including Kemps' sign, Adams' test, trendelenburg, lasegue, Fabre Patrick, Laguerre's test, bilateral leg raise, iliac compression, Elys' Test and Heel. He stated the following:

"It is of my opinion that there is a causal relationship between [appellant's] disability and injuries sustained [on] June 24, 1973. The fall that [he] took was great enough to cause an anterior fracture, as well as a drifting a segment of the L4 vertebral body. The anterior drifting ... would have also damaged the anterior longitudinal ligaments, which is what allowed the segment to drift forward and aids in the instability of the spine. The vertebral bodies are the weight bearing structures of the spine, which help carry the bodies weight down the spine. The force that the spine took was great enough to break the L4 vertebrae, was also great enough to create a subluxation to the L4 vertebrae, as well as others in the lumbar region."

Dr. Kowalski concluded that appellant was totally disabled based on his earlier compression fracture which healed years ago but left appellant with disc degeneration, as well as herniated discs and signs and symptoms of sciatica.

In a December 9, 1997 report, Dr. Francis D. O'Malley noted that appellant was seen by him from March to September 1997 for a herniated disc in the lumbar spine. He opined that appellant's back condition was attributable to the June 24, 1973 work injury and that the injury was "a competent producing cause of his disability at this time."

By decision dated April 2, 1998, the Office denied modification following a merit review. The Office specifically found that the new medical reports introduced on reconsideration were insufficient to overcome the opinion of the impartial medical specialist and that they failed to create a new conflict in the record.

The Board finds that the Office properly terminated appellant's compensation benefits.

Once the Office accepts a claim it has the burden of proof of justifying modification or termination of compensation. After it has been determined that an employee has disability casually related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.²

In the instant case, the Office accepted that appellant sustained a compression fracture and appellant began receiving compensation benefits for temporary disability on the periodic rolls. By letter dated August 28, 1996, the Office notified appellant that it proposed to terminate his compensation on the grounds that the weight of the medical evidence, as represented by an impartial medical specialist, established that appellant's employment-related disability had ceased and that he no longer suffered from residuals of his accepted employment injury. Appellant's compensation was subsequently terminated in a decision dated January 16, 1997.

² *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

The Board finds that the Office properly referred appellant for an examination by an impartial medical specialist given the conflict in the medical opinions between appellant's treating physicians, Drs. Chehebar and Zolan, and the Office's second opinion referral physician, Dr. Illman, as to whether appellant was disabled from work due to his herniated disc. Section 8123(a) of the Federal Employees' Compensation Act provides that, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."³

The impartial medical specialist, Dr. Puglisi, provided a rationalized opinion based on his own examination and review of the medical record that appellant was no longer disabled by his work-related injury. He explained why appellant's compression fracture was only considered to be a minor fracture at the time of his June 24, 1973 fall and why appellant's work-related back condition would have resolved after several months of the injury. Dr. Puglisi opined that appellant's pain symptoms arose from the herniated disc and that the herniated disc was causally related to degenerative disc disease brought on by age and not the work injury. He specifically opined that appellant's work-related disability had ceased and that appellant no longer had any need for continuing medical treatment. Dr. Puglisi further suggested that appellant was magnifying his symptoms, noting that the July 1996 MRI scan did not show any indication of radiculopathy consistent with appellant's subjective complaints.

Where there exists a conflict in the medical opinion evidence and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, is entitled to special weight.⁴ Because Dr. Puglisi's report is sufficiently well reasoned and based on a proper factual background, it is entitled to special weight. Thus, the Board finds that the Office discharged its burden of proof in terminating appellant's compensation benefits after February 2, 1997.

The Board further finds that the Office properly terminated appellant's authorization for medical benefits effective February 2, 1997.

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁵ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment. The Office met its burden of proof through the report of Dr. Puglisi, who found no residual condition caused by the accepted employment injury and provided rationale in support of that conclusion.

³ 5 U.S.C. § 8123.

⁴ *Leanne E. Maynard*, 43 ECAB 482 (1992).

⁵ *Furman G. Peake*, 41 ECAB 361 (1990).

Given that the Board has found that the Office properly relied upon the opinion of the impartial medical examiner in terminating compensation, the burden of proof shifts to appellant to establish that she remains entitled to compensation after that date.⁶

In this case, appellant submitted an October 30, 1997 report by Dr. Chehebar, reiterating the physician's opinion that appellant was totally disabled due to a disc herniation he developed as a result of the June 24, 1973 work injury. Because the new report is similar to previous reports and since Dr. Chehebar was on one side of the conflict resolved by Dr. Puglisi, the October 30, 1997 report is insufficient to create a conflict.⁷

The decision of the Office of Workers' Compensation Programs dated April 2, 1998 is hereby affirmed.

Dated, Washington, D.C.
August 17, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ *George Servetas*, 43 ECAB 424 (1992).

⁷ *Josephine L. Bass*, 43 ECAB 929 (1992).